

DECLARATION OF JUDGE JESUS

1. I have voted in favour of all the operative clauses, since I share, in general, the interpretations made and the conclusions reached in this Opinion.

Notwithstanding my vote in favour, I have diverging views regarding the interpretation of the scope and the nature of the obligation under article 194, paragraph 2.

2. Paragraph 2 of article 194 reads:

States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.

3. In paragraph 258 of this Opinion, the Tribunal, in advancing the interpretation of paragraph 2 of article 194, concludes as follows:

To conclude, article 194, paragraph 2, of the Convention imposes upon States Parties a particular obligation applicable to the transboundary setting in addition to the obligation to prevent, reduce and control pollution from anthropogenic GHG emissions. Under this provision, States Parties have the specific obligation to take all measures necessary to ensure that anthropogenic GHG emissions under their jurisdiction and control do not cause damage to other States and their environment, and that pollution from such emissions under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights. It is an obligation of due diligence. The standard of due diligence under article 194, paragraph 2, can be even more stringent than that under article 194, paragraph 1, because of the nature of transboundary pollution.

4. Regrettably, I do not entirely share the interpretation as summed up in this concluding paragraph of the Opinion. My difficulties with the conclusions reached in the Opinion are as follows:

I. The scope of the obligation of States under paragraph 2

5. As I see it, paragraph 2 has a different scope from that of paragraph 1 of article 194 of the Convention. These paragraphs address different situations. While paragraph 1 of article 194 addresses the issue of prevention, reduction and control of pollution of the marine environment, as a general policy and as a general obligation that all States, individually or jointly, should observe to attain those goals, in paragraph 2, the focus is rather on the behaviour of the individual State (not jointly with other States) to ensure that activities under its jurisdiction and control are so conducted as not to cause damage by pollution to other States and “their environment” (not to the marine environment in general).

6. Likewise, the second part of the obligation under paragraph 2 – in accordance with which States shall ensure that “pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention” – clearly indicates that this paragraph is not concerned with the marine environment in general, in which case this formulation would have included the maritime areas belonging to the State under whose jurisdiction or control pollution-causing activities take place. Moreover, if this obligation were to apply to anthropogenic GHG emissions as asserted in this Opinion, how would States be able to avoid the spread of GHG emissions “beyond the areas where they exercise sovereign rights”?

7. While this Opinion implies that the obligation under paragraph 2 is broader in scope than the obligation under paragraph 1, I hold the opposite view. My conclusion is that the scope of this obligation under paragraph 2 is in fact narrower than the obligations under paragraph 1. Paragraph 2 is more concretely and more specifically concerned with the harm or damage that may be caused by transboundary pollution to a State originating from activities under the jurisdiction or control of another State; or, in cases of pollution arising from incidents or activities under the jurisdiction or control of a State, with preventing such pollution from spreading beyond the areas where such State exercises sovereign rights. These are cases of transboundary pollution that, more often than not, occur between neighbouring countries or neighbouring maritime areas, though it is not excluded that such cases of

transboundary pollution may also occur between distant countries or maritime areas, such as in cases where such pollution is caused by ships in the EEZ of another State or by certain activities.

8. The scope of paragraph 1, on the contrary, is as limitless as it can be: it encompasses measures necessary to prevent, reduce and control pollution to the whole of the marine environment as such and not specifically the environment of any particular State. It is to be noted, and rightly so, that the “marine environment” concept retained by this Opinion includes, *inter alia*, all areas of the sea, including the maritime areas under the jurisdiction of States and the marine living resources. As indicated in the Opinion, the term “marine environment” is a broad concept (see paragraphs 167 and 168). It becomes clear that the space to which paragraphs 1 and 2 apply are substantially different in their scope.

9. In my view, the obligations under paragraphs 1 and 2 are complementary to the extent that they both fulfil important roles in controlling pollution and in protecting and preserving the marine environment, but pursue different goals and address different realities.

10. For these reasons, while I share the view in the Opinion that “article 194, paragraph 2, of the Convention imposes upon States Parties a particular obligation applicable to the transboundary setting” (see paragraph 258), I have difficulties in accepting the conclusion in the Opinion that this is “in addition to the obligation to prevent, reduce and control pollution from anthropogenic GHG emissions” (see paragraph 258). In my view, the purpose of paragraph 2 is not to address the situation of pollution of the marine environment as a whole caused by anthropogenic GHG emissions – an objective that is left entirely to paragraph 1 to pursue.

11. To say that paragraph 2 addresses a particular obligation applicable to the transboundary setting “in addition to the obligation to prevent, reduce and control pollution from anthropogenic GHG emissions” would be tantamount to admitting that paragraph 1 becomes redundant or is rendered superfluous, as the ambit of its application would be covered by that of paragraph 2. If this were the case, it would deprive paragraph 1 of its *effet utile*.

II. The nature of the obligation of States under paragraph 2

12. This Opinion considers the obligation under paragraph 2 as one of due diligence (see paragraph 255) and as an obligation of conduct and not of result. I do not share this conclusion in the Opinion in its entirety. While I agree that it is an obligation that requires measures of due diligence, this obligation also imposes the achievement of results.

13. Where State activities may cause damage to another State or its environment or to the marine environment as a whole, due diligence measures should always be observed by the State involved in such activities, as a precautionary approach, with a view to minimizing the possibilities of the occurrence of pollution, irrespective of whether the obligation is one of conduct or of result. Due diligence in this sense should be seen as normal conduct required of any State whenever it engages in or authorizes activities that are likely to cause substantial pollution, in light of the serious risk, potential severe effects, significant harm and sometimes irreversible damage that may result from such pollution.

14. In the context of the provision of paragraph 2, however, while the due diligence measures are called for, compliance with the due diligence standards is not enough to satisfy States' compliance with the obligation under this paragraph. In my view, the obligation is also one of result for the following reasons:

(i) The indication of a result-oriented obligation expressed in the wording of the paragraph itself when it establishes that "States shall take ... measures necessary to ensure that activities under their jurisdiction or control *are so conducted as not to cause damage by pollution to other States and their environment*". In light of this wording, it is hard to argue that this is not a result-oriented obligation. In fact, the Opinion itself seems to have reached the same conclusion when, in paragraph 238, it states that the "obligations under some provisions of Part XII, including article 194, paragraph 2, are formulated in such a way as to prescribe not only the required conduct of States but also the intended objective or result of such conduct." Though this position of the Opinion in this respect seems to be the correct interpretation of

the provision of paragraph 2, the Opinion in the end opted to characterize the obligation under this paragraph as an obligation of conduct and not of result.

(ii) In the context of environmental damage, in particular in cases of transboundary pollution damage under paragraph 2, it cannot be said that the State whose activities caused damage to another State or its environment is not responsible “because it would not be reasonable to hold a State, which has acted with due diligence, responsible simply because such pollution occurred” (see paragraph 236).

15. Even where a State has taken all measures of due diligence that are required by the books to avoid the occurrence of environmental damage to another State, but damage has nonetheless occurred, the responsibility of the former State may be engaged on the basis of strict responsibility for the environmental damage caused, if causation is established. It may not be reasonable, in a situation of transboundary pollution damage caused to a State or its environment by activities under the jurisdiction and control of another State, to leave the burden and the costs incurred in restoring the situation predating the damage to the injured State. Certainly, such an interpretation, in my view, would run counter to the content of paragraph 2. A State that benefits from certain activities carried out by it or under its authorization which end up causing transboundary damage to another State or its environment cannot expect the injured State to bear the costs incurred by the damage inflicted on it and suffer the losses caused by such activities, even if all the measures of due diligence had been taken.

16. To conclude, my view is that paragraphs 1 and 2 of article 194 of the Convention address different situations of pollution and therefore aim at reaching different goals. The purpose of paragraph 2 is not to address the situation of pollution of the marine environment caused by anthropogenic GHG emissions in the context of this case. This is an objective left entirely to paragraph 1.

17. The obligation under paragraph 2, in my view, is not one of conduct, as concluded in this Opinion, but rather one of result for the reasons explained.

(signed)

José Lu s Jesus